

Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?

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Tracey Thurman's husband, Charles, abused her even after she left him. He would come to the house and attack her, or threaten to kill her. Tracey's numerous calls to the police for help were ignored. Even after Charles was put on probation for smashing the windshield of Tracey's car while she was in it, the police refused to arrest him for violating his probation. When Tracey asked the police to arrest her husband after he threatened to shoot her and her son, they told her to come back in three weeks, and referred her to the city's Family Relations office. When she returned three weeks later, having obtained a court order restraining Charles from assaulting or threatening her, the police said they could do nothing until after the holiday weekend. But after the weekend, the police informed her that the only officer who could arrest her husband was on vacation. Police officers told Tracey that because her complaints were against her husband, they would have to witness some act of harassment before they would take action. Tracey's friends and relatives protested the police's inaction, but achieved no better results. When Tracey's husband next came to her house and demanded to speak to her, she immediately called the police and asked them to arrest him for violating the terms of his probation as well as the restraining order. The police officer who received the call stopped off at the Torrington Police Department to relieve himself before proceeding to Tracey's house. By the time the police officer arrived 25 minutes later, it was too late: Charles had already stabbed Tracey repeatedly in the chest, neck, and throat.¹

Tracey Thurman's story—the story of a battered woman² who could not obtain police assistance to protect her from her battering husband—is unfortunately an all too common one in our society. Numerous studies document that the police rarely arrest batterers.³ In general, police treat

1. *Thurman v. Torrington*, No. H-84-120 (D. Conn. Sept. 5, 1985) (ruling on defendant's motion for n.o.v.). *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

2. Throughout this Note, references to battered women should be understood to apply both to women who are beaten by their husbands and to unmarried women who are beaten by the men with whom they live.

3. A recent study of 146 battered women in Milwaukee found that "the wives asked police officers

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domestic violence much less seriously than they treat assaults between strangers.⁴

In this Note I will argue that the police policy of non-arrest in cases of domestic violence denies women the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution,⁵ and is thus an impermissible form of sex discrimination. The legal standard of proof for an equal protection violation differs depending on whether the police policy is explicitly directed against women, or is framed in gender-neutral terms of non-interference in "domestic" problems. In the former case, I will show that a police policy of non-interference and non-arrest is not substantially related to an important state interest,⁶ but is based on the constitutionally impermissible stereotypic view that men have the right to beat their wives.⁷ In the harder-to-prove gender-neutral case, I will show that the police policy is motivated by a discriminatory intent to harm women.⁸ In some cases, invidious intent can be proven by actual statements of officers in support of men's right to batter. In other cases, I will argue, the assertion of "family privacy" as a justification for non-

to arrest their husbands in 82% of the incidents, but an arrest occurred in only 14% of the incidents." Bowker, *Police Services to Battered Women—Bad or Not So Bad?*, 9 CRIM. JUST. & BEHAV. 476, 485-86 (1982). Another study found that police officers refused to make 61% of the arrests requested by battered women. Pagelow, *Double Victimization of Battered Women: Victimized by Spouses and the Legal System* (1980) (unpublished paper), cited in Bowker, *supra*, at 478. Even lower arrest percentages are reported in Oppenlander, *Coping or Copping Out: Police Service Delivery and Domestic Arguments and Assaults* (1980) (unpublished paper), cited in Bowker, *supra*, at 478; and Vanfossen, *Intersexual Violence in Monroe County, New York*, 4 VICTIMOLOGY 299, 302 (1979) (arrest made in 25% of cases in study, upstate N.Y.). See also J. FLEMING, STOPPING WIFE ABUSE 170-74 (1979) (documenting "low priority" assigned to domestic calls); L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 24 (1981) (available from the Center for Women Policy Studies, Washington, D.C.) (police "rarely file reports on incidents of spouse abuse, and even more rarely make arrests"); D. MARTIN, BATTERED WIVES 93-100 (1st ed. 1976) (illustrating police non-arrest policy in numerous cities); Fields, *Wife Beating: Government Intervention Policies and Practices*, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 20, 21 (1978) (police fail to respond to calls for help, and exacerbate problem when they do respond by being supportive of attacker); R. Langley & R. Levy, *Wife Abuse and the Police Response* 5-9, F.B.I. Law Enforcement Bulletin, (1978) cited in Bowker, *supra*, at 491 (official department policies encourage non-arrest); Parnas, *The Police Response to the Domestic Disturbance*, 1967 Wis. L. REV. 914, 916-22 (Chicago police training and department policy discourage arrest).

4. See L. LERMAN, *supra* note 3, at 25 ("Injuries which would be grounds for arrest of a stranger assailant are often found insufficient to justify arresting a man who beats his wife or girlfriend.").

5. *Scott v. Hart*, No. 76-2395 (N.D. Cal. 1976) raised the issue of whether such a non-arrest policy violates the Fourteenth Amendment (pleadings available at National Clearinghouse for Legal Services). The court issued no ruling on this issue, however, because the case was settled. For a discussion of *Scott v. Hart*, see Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 SIGNS: J WOMEN CULTURE & SOC'Y 554 (1983). In *Thurman*, the court denied the City of Torrington's motion to dismiss Thurman's claim that the non-arrest policy violated the equal protection clause of the Fourteenth Amendment. 595 F. Supp. at 1529. A jury awarded Thurman \$2.3 million in damages after finding that twenty-four Torrington police officers violated the equal protection clause. See *infra* text accompanying notes 29-31.

6. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

7. See *infra* notes 27-31 and accompanying text.

8. See *infra* notes 46-53 and accompanying text.

intervention in the face of the batterer's criminal behavior, and in the face of the woman's pleas for intervention, demonstrates that police are motivated by their belief that it is a man's right to rule the home as he pleases.⁹ Police perpetuation of this stereotype harms women, and is evidence of discriminatory intent.

I. THE POLICE POLICY TOWARD BATTERED WOMEN

The police policy towards battered women can take a variety of forms, from an outright refusal to arrest batterers and to recognize domestic violence as a criminal matter,¹⁰ to a practice of giving domestic violence calls lower priority than non-domestic disputes.¹¹ Sometimes police policy is explained in written manuals.¹² Often it is not in writing, but is demonstrated by a pattern of police behavior that treats assaults by men against their wives less seriously than assaults by strangers.¹³

By allowing men to beat their wives with impunity, the state implicitly condones such behavior and is thus complicit in one of the most fundamental and extreme acts of male domination over women in contemporary American society.¹⁴ When the police refuse to treat battering as a crime,

9. See *infra* notes 54-72 and accompanying text.

10. See *supra* notes 3-4.

11. See *infra* note 30.

12. Bowker writes:

[T]he reticence of police officers to invoke legal sanctions against wife beaters . . . is not just a matter of the preferences of individual police officers. The official policies of police departments, as evinced in training documents, often encourage police officers to avoid the application of criminal sanctions in domestic violence cases.

Bowker, *supra* note 3, at 490-91 (citations omitted). For example, until recently, Michigan police were instructed:

For the most part these disputes are personal matters requiring no direct police action. . . . The officer should never create a police problem when there is only a family problem existing. [In domestic violence situations, police should follow this outline:]

- a. Avoid arrest if possible. Appeal to their vanity.
- b. Explain the procedure of obtaining a warrant.
 - 1) Complainant must sign complaint;
 - 2) must appear in court;
 - 3) consider loss of time;
 - 4) cost of court.
- c. State that your only interest is to prevent a breach of the peace.
- d. Explain that attitudes usually change by court time.
- e. Recommend a postponement.
 - 1) Court not in session.
 - 2) No judge available.

Eisenberg & Micklow, *The Assaulted Wife: Catch 22 Revisited*, 3 WOMEN'S RTS. L. REP. 138, 156-57 (1977) (citing International Association of Chiefs of Police, Training Key No. 16, Handling Disturbance Calls 94-95 (1968-69) and Wayne County Sheriff Police Training Academy: Domestic Complaints Outline 2-3). See also Parnas, *supra* note 3, at 917 (Chicago training outline tells police that "the majority of [domestic] calls are non-criminal calls and don't warrant any punitive action").

13. See *infra* note 30.

14. Feminist scholars have persuasively argued that woman battering is not merely the violent behavior of a few mentally disturbed individual men, but is a graphic and explicit demonstration of

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women are likely to see the police as being on their husband's side, and to feel frustrated, helpless, and alone.¹⁵ Most importantly, even if an arrest does not lead to a conviction, it is the most effective way for police to protect women from further abuse.¹⁶

The police non-arrest policy is most commonly justified by a belief in "family privacy," a doctrine dictating that the state should not intervene in domestic matters.¹⁷ The current policy, and its privacy justification, has

men's domination over women. Woman battering is a violent manifestation of the patriarchal beliefs that men have the right to dominate, control, and rule over women, particularly when those women are, as wives or girlfriends, the "property" or "possession" of men. For an elaboration of this feminist viewpoint, see generally R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979); J. FLEMING, *supra* note 3; R. LANGLEY & R. LEVY, *WIFE BEATING, THE SILENT CRISIS* (1977); D. MARTIN, *supra* note 3; E. PIZZET, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1974); S. SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982).

15. Sometimes a battered woman may feel driven to harm or even kill her oppressor, self-help being one of her only viable alternatives when the police refuse to arrest, and the woman is unable to leave the batterer. See A. JONES, *WOMEN WHO KILL* (1980); F. McNULTY, *THE BURNING BED* (1980); see also Note, Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 *HASTINGS L.J.* 895, 931 (1981) (many factors, including sex discrimination, "foreclose to the battered woman the obvious option of leaving her attacker").

16. The *Minneapolis Domestic Violence Experiment*, a study conducted by the National Institute of Justice, a U.S. Department of Justice research agency, compared the effectiveness of arrest with that of advice/mediation, and ordering a violent spouse to leave for 8 hours, in cases of "moderate" domestic violence. The study concluded that victims of domestic assault are about twice as likely to be assaulted again if police do not arrest the attackers. See *Arrest Deters Domestic Violence*, *TRIAL*, Aug. 1984, at 83; *Domestic Violence: Study Favors Arrest*, *N. Y. Times*, Apr. 5, 1983, at C1, col. 1 (copies of Minnesota study available from National Institute of Justice, Room 903, 633 Indiana Ave. N.W., Washington, D.C. 20531).

Raymond Parnas advocates a "traditional response of arrest, prosecution, and sanction . . . not only at the upper levels of violence, but also at the first minimal signs of trouble," because data shows that, unless deterred, attacks "escalat[e] from minimal to aggravated injury." Parnas, *The Relevance of Criminal Law to Inter-Spousal Violence*, in *FAMILY VIOLENCE* 188, 190-91 (J. Eekelaar & S. Katz eds. 1978).

In some localities, police refer battered women and their husbands to community mediation centers instead of arresting the batterer. A counselor talks to the couple about their perceptions of the problem, and tries to negotiate a proposal for future behavior to which both parties will agree. Instead of emphasizing that the husband/batterer has engaged in criminal behavior, such mediation programs imply that the problem is mutual. Although compromise and negotiation are necessary if a couple hopes to stay together and improve their relationship, they are an inappropriate response to criminal battering behavior. "There should be no 'compromise' with respect to violence." Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 *LAW & INEQUALITY: J. THEORY & PRAC.* 493, 511 (1984). "Mediation may actually perpetuate battering by protecting the batterer from criminal sanctions. This protection reinforces the husband's belief in his right to beat his wife, it absolves him of blame for his actions, and insulates him from social stigma." *Id.* at 518. See also U.S. CIVIL RIGHTS COMMISSION, *UNDER THE RULE OF THUMB* 96 (1982) [hereinafter cited as *Rule of Thumb*] (Mediation fails to punish assailants for their crimes, and thus "implies that victims share responsibility for the illegal conduct. . . . Mediation and arbitration should never be used as an alternative to prosecution in cases involving physical violence."); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 *HARV. WOMEN'S L.J.* 57, 113 (1984) (Law enforcement is more desirable and effective response to wife abuse than mediation; mediators should "not blame the victim for the violence, but rather [should] strive to reduce the inequality of bargaining power between the parties.").

17. "Police traditionally have viewed most incidents of spouse abuse as private matters that are best resolved by the parties themselves without resort to the legal process." *Rule of Thumb*, *supra* note 16, at 21. See also Buzawa, *Police Officer Response to Domestic Violence Legislation in Michigan*, 10 *POLICE SCI. & AD.* 415, 415-16 (1982) ("police have historically taken the position that it

its roots in a long common law history. At common law, the husband was recognized as the ruler of the home, with the right to make all decisions for the family unit. Under the doctrine of coverture, husband and wife were considered to be one person—that one person being the husband.¹⁸ A woman who married thus relinquished her legal autonomy, to become at one with—and dominated by—her husband.

As a corollary to the husband's right to rule the home and his legal responsibility for all of his wife's acts, he was given the right to beat his wife in chastisement. As William Blackstone explained, "For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement."¹⁹ Husbands were allowed to beat their wives in chastisement, as long as they used a switch no bigger than their thumb.²⁰ Thus, the common law explicitly supported men's right to rule the home, and condoned their use of violence in maintaining that rule.

The common law explicitly linked the right of the husband to use force in governing his wife's behavior to the state policy of non-interference in the private family realm. The doctrine of "family privacy" forbade interference with, and simultaneously condoned, such beatings. As a North Carolina Court wrote in 1864,

[U]nless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.²¹

Although the courts no longer grant men the right to batter their wives, current police policies implicitly condone behavior once explicitly con-

was not their responsibility to intervene in domestic conflicts").

18. Eisenberg & Micklow, *supra* note 12, at 145.

19. 1 W. BLACKSTONE, COMMENTARIES *445.

20. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 136 (4th ed. 1971).

21. State v. Black, 60 N.C. 266, 267-68 (1864). In State v. Rhodes, 61 N.C. 453 (1868), a North Carolina court found a battering husband not guilty of assault and battery after he beat his wife with a switch, even though he beat her "without any provocation" and "the violence complained of would without question have constituted a battery if the subject of it had not been the defendant's wife." *Id.* at 454. The rationale protecting the man's right to dominate his wife was then, as today, a respect for the autonomy of "family government" and the desire not to "rais[e] the curtain upon domestic privacy." *Id.* at 459. As the Superior Court of Mississippi similarly held in 1824, a man should be free to "chastise" his wife "without subjecting himself to vexatious prosecutions for assault and battery." Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824). See Eisenberg & Micklow, *supra* note 12, at 138 (tracing common law developments); Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241 (1917) (tracing common law developments). See also State v. Edens, 95 N.C. 696, 59 Am. Rep. 294, 295 (1886) (state "drops the curtain" on domestic violence unless it is so excessive "as to put life and limb in peril").

done at common law. The police's non-interference policy, justified by a definition of family privacy that recognizes only the man's desires, empowers men to batter women. Just as the old common law assertion of a man's right to batter would no longer be constitutionally upheld, the same system in its modern form of police non-arrest and non-interference must also be held constitutionally invalid.

II. PROVING AN EQUAL PROTECTION VIOLATION IN THE EASIER CASE: A SEX-BASED CLASSIFICATION

The Fourteenth Amendment to the Constitution requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." On its most basic level, the equal protection clause is a protection against arbitrariness. Courts have interpreted the equal protection clause to require that any law that distinguishes between people and treats them differently on the basis of that distinction be rationally related to a legitimate state interest.²²

Particular kinds of distinctions, however, require greater justification by the state. Laws or policies discriminating on the basis of race, for example, have been deemed "suspect," and must therefore meet a test of "strict scrutiny." They will be upheld only if the state can show that they are closely related to a compelling state interest.²³ Classifications that infringe on a "fundamental right" are also subject to strict scrutiny.²⁴

Gender classifications were once subject to the lowest, rational relation standard of review.²⁵ Since the 1970's, however, the Supreme Court has imposed an intermediate level of scrutiny upon laws and policies that dis-

22. See, e.g., *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") This "rational relation test," as it is known, applies to all laws. In most cases, the state has been able to sustain its burden of proving a rational relation, and few laws have been held unconstitutional on rational relations grounds. G. GUNTHER, *CONSTITUTIONAL LAW* 671 (10th ed. 1980) (rational relations test provides "minimal scrutiny in theory and virtually none in fact").

It can be argued that a police policy that treats domestic violence cases differently from assaults made by strangers has no rational justification, and thus violates this test. The plaintiff in *Thurman* raised a rational relations challenge, but the Court treated the case as one of sex discrimination. See *infra* note 30.

23. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating antiscegenation law); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidating criminal statute prohibiting interracial cohabitation).

24. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (fundamental right to travel restricted without compelling state interest); *Reynolds v. Sims*, 377 U.S. 533 (1964) (fundamental right to vote restricted without compelling state interest).

25. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (using rational relation test to uphold state law prohibiting women from bartending unless they were daughters or wives of male bar owners); *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971) (upholding single-sex secondary education under rational relation test).

criminate on the basis of sex. To be constitutional, such laws or policies must be substantially related to important governmental interests.²⁶

The Supreme Court has refused to uphold gender-based classifications when they reflect "archaic and stereotypic notions" about the roles and relative abilities of men and women.²⁷ Thus, for example, the Supreme Court recently found that restricting enrollment in a state nursing school to women constituted impermissible sex discrimination, because the enrollment policy was based on "the stereotyped view of nursing as an exclusively woman's job."²⁸ Similarly, a gender-based police policy of refusing to arrest men who batter their wives or girlfriends is based on stereotypic views of sex roles, and thus violates the Fourteenth Amendment.

In the seminal case of *Thurman v. Torrington*,²⁹ the district court found that a police policy of not arresting men who battered their wives was based on the impermissible stereotypic view that husbands are allowed to physically abuse their wives. Applying intermediate scrutiny to a gender-based policy,³⁰ the court failed to find any permissible important state objective justifying the policy. The court held that

26. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (unanimously invalidating benefits statute that assumed, for administrative convenience, that wives were financially dependent on spouses but husbands were not; four Justices found that sex was a suspect classification, three abstained from deciding that question.); *Craig v. Boren*, 429 U.S. 190 (1976) (majority holding that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

27. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982).

28. *Id.* at 729. For other cases proscribing "stereotypic notions" and "generalizations" about women's "place" in society, see *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (same); *Wengler v. Drug-Gists Mutual Insurance Co.*, 446 U.S. 142 (1980) (same); *Orr v. Orr*, 440 U.S. 268 (1979) (same); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (assumption that females are normally dependent on earnings of spouse but males are not is constitutionally forbidden basis for statute); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (same); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (same); *Reed v. Reed*, 404 U.S. 71 (1971) (assumption that men are more competent than women to administer estates or manage property is invalid justification for discriminatory policy).

29. 595 F. Supp. 1521 (D. Conn. 1984).

30. The court noted, "It may develop that the classification in the instant case is not one based on gender, but instead consists of all spouses who are victims of domestic violence—male and female. At this stage of the proceedings, however, plaintiffs' allegations of gender-based discrimination will be taken as true." 595 F. Supp. at 1528 n.1.

The Torrington police department never explicitly stated a gender-based classification, and the plaintiff never alleged the existence of such a classification. Rather, the plaintiff alleged a "pattern or practice of affording inadequate protection, or no protection at all, to women who have complained of having been abused by their husbands or others with whom they have had close relations." *Id.* at 1527. Such a pattern and practice was found to be "tantamount to an administrative classification used to implement the law in a discriminatory fashion." *Id.* As the court explained,

[The plaintiff] simply asserts that it is violative of equal protection for police to consistently choose to give domestic disputes lower priority than non-domestic disputes, to treat domestic disputes less seriously than non-domestic disputes, or to altogether ignore complaints made by women in domestic disputes. Such a consistently made choice is no longer the exercise of discretion, but rather is the creation of a classification. In other words, Tracey Thurman's claim

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A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly [sic], a police officer may not knowingly refrain from interference in such violence, and may not automatically decline to make an arrest simply because the assaulter and his victim are married to each other. Such inaction on the part of the officer is a denial of the equal protection of the laws.³¹

In some cases, police may try to justify their failure to arrest batterers as a waste of time and resources because battered women often drop the charges against their assailants. Thus police may defend their policy as substantially related to the important state interest of using limited resources most efficiently. The Minnesota study's evidence of the value of an arrest even without a subsequent conviction³² reveals the invalidity of this justification, however, and demonstrates the need for police to fulfill their legal duty irrespective of the results in the prosecutor's office.³³

The *Thurman* court found that a gender-based policy premised on the stereotype that husbands are allowed to beat their wives is unconstitutional. The harder case arises when a police non-arrest policy is premised not on an openly gender-based classification, but instead on a seemingly gender-neutral policy of not interfering in "family matters."

is that it is violative of equal protection for police to create a classification, however cloaked in the language of discretion, which metes out the right to enforcement of the criminal law in a manner which ultimately is based on gender.

Thurman v. Torrington, No. H-84-120 at 14 n.2 (D. Conn. Sept. 5, 1985) (ruling on individual defendants' motion for judgment n.o.v.).

Thus, the court held, a pattern and practice of discrimination in administration of the law may be considered equivalent to an explicit sex-based classification, requiring invocation of intermediate scrutiny. Particularly notable in *Thurman* is that the evidence of the police's discriminatory pattern and practice was derived from Tracey Thurman's individual experience with police over an eight month period, rather than from a survey of Torrington police's response to battered women generally.

31. 595 F. Supp. at 1528 (citations omitted). In this ruling, the court rejected a pre-trial motion to dismiss. At trial, a jury awarded Tracey Thurman \$2.3 million in damages against individual police officers, but not against the City of Torrington, to compensate Tracey Thurman for the brutal stabbing that resulted from the police's repeated refusal to arrest her battering husband. The parties settled for \$1.9 million. *Thurman*, No. H-84-120 (D. Conn. 1984).

32. See *supra* note 16.

33. Lisa Lerman indicates that the reasons battered women drops charges may have as much to do with the negative responses of the prosecutor as with the women themselves. L. LERMAN, *supra* note 3, at 33-34. She further notes that police willingness to arrest may encourage women to press charges. *Id.* at 119-20.

III. PROVING AN EQUAL PROTECTION VIOLATION IN THE HARDER CASE: DISCRIMINATORY INTENT AND THE FACIALLY NEUTRAL CLASSIFICATION

A. *The Constitutional Standard*

Some laws or policies may unlawfully discriminate against women even though on their face they apply to both sexes.³⁴ For there to be an equal protection violation in such cases, the Supreme Court has held, it is not enough to prove that the facially neutral policy disproportionately harms the protected group.³⁵ Rather, since *Washington v. Davis*,³⁶ plaintiffs have been required to prove that the law or policy, though neutral on its face, was created with the *intent* to discriminate on the basis of sex.³⁷

Exactly what is required to prove discriminatory intent is not clear. Recognizing that, under contemporary norms, few policymakers are likely to state openly their intent to discriminate, the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*³⁸ elaborated a variety of methods by which discriminatory intent could be inferred. The Court suggested that the historical background of a policy should be examined as an evidentiary source that may reveal discriminatory intent.³⁹ In some rare cases, the Court held, the disparate im-

34. This claim was made by the plaintiff in *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). See *infra* note 43.

35. Statutory prohibitions against discrimination such as Title VII employ an "effects test," prohibiting the use of facially neutral classifications that operate to disproportionately exclude members of a protected group. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (disallowing under Title VII employment test that had disparate adverse effect on black applicants, unless such test was substantially related to job performance).

36. 426 U.S. 229 (1976).

37. *Id.* at 239-45. In *Davis*, unsuccessful black applicants for employment as police officers claimed that a qualifying test was racially discriminatory because it bore no relationship to job performance and excluded a disproportionately high number of black applicants. The Court held that the *Griggs* disparate effect standard, *supra* note 35, did not apply to constitutional violations. The Court's decision not to apply the "effects test" to Fourteenth and Fifth Amendment violations was based in part on the fear that such a standard would be too "far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. at 248 (footnote omitted). For a history of the convoluted, pre-*Davis* development of disproportionate impact and discriminatory intent standards, see Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 26-31 (1976).

38. 429 U.S. 252 (1977). In that case, the Metropolitan Housing Development Corporation (MHDC) applied for a zoning permit to allow them to build a racially integrated low- and moderate-income housing development. The Village denied the zoning application, purportedly out of a desire to protect property values and maintain single family zoning. The Supreme Court held that the equal protection clause was not violated because MHDC only proved the discriminatory effect of the zoning decision, but did not prove that the zoning denial was motivated by discriminatory intent.

39. The Court said:

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. . . .

pact of a policy or law might be so extreme as to permit an inference of discriminatory intent.⁴⁰ Similarly, extreme discrimination in the administration of a facially neutral law may provide proof of discriminatory intent.⁴¹

The Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney*⁴² further elaborated the meaning of the intent standard, and narrowed the circumstances in which intent can be found. The Court held that the foreseeability of a highly disproportionate discriminatory impact was insufficient to prove that the law was passed with discriminatory intent.⁴³ Rather, to prove intent, the plaintiff must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁴⁴

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purpose. . . . [C]ontemporary statements by members of the decisionmaking body . . . [may be highly relevant].

Id. at 266-68 (citations omitted).

40. *Id.* at 266 ("The impact of the official action . . . may provide an important starting point."). See also *Washington v. Davis*, 426 U.S. 229, 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

41. The Court in *Davis* held: "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate . . ." 426 U.S. at 24 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (equal protection violated when ordinance prohibiting operation of laundries in wooden buildings was enforced only against Chinese businessmen)). The Supreme Court interpreted the facts in *Yick Wo* to be an example of such blatantly discriminatory enforcement of a facially neutral law that the discriminatory pattern of enforcement was itself proof of discriminatory intent. See *Davis*, 426 U.S. at 241; *Arlington Heights*, 429 U.S. at 266; *Feeney*, 442 U.S. at 272. See also G. GUNTHER, *supra* note 22, at 709 ("purposeful, hostile discrimination is inferred from data regarding administration of a facially neutral law").

Thus, it can be argued that a police policy of failing to enforce arrest laws in cases of domestic violence is a discriminatory application of facially neutral laws, demonstrative of a discriminatory purpose. The *Thurman* court, however, treated blatant discrimination in administration or enforcement of the law as proof of the existence of a gender-based administrative classification, see *supra* note 30, and thus as grounds for invoking intermediate scrutiny, obviating the need to reach the question of intent. Evidence of discriminatory administration of a facially neutral law may therefore be relevant to the arguments made in both Part II and Part III of this Note.

42. 442 U.S. 256 (1979).

43. In *Feeney*, Massachusetts instituted a system of preferential hiring for veterans for state civil service jobs. Helen Feeney, an unsuccessful female job applicant, claimed that discriminatory intent could be inferred from the fact that the veterans preference was adopted with full foreknowledge that it would greatly disadvantage women, because over 98% of the veterans were men. Because the Court found that the law was adopted for the permissible purpose of aiding veterans, rather than for the impermissible purpose of discriminating against women, the statute was upheld.

The miniscule number of female veterans in the United States is the result of open gender discrimination within the armed forces that prohibits women from combat duty. The Supreme Court refused to consider this discrimination within the armed forces as relevant to Helen Feeney's case, however. Nor did the Court consider the less blatant discriminatory notions that might have inhered in the legislature's decision to provide an advantage to veterans, e.g., a desire to honor veterans because they embody the highest goals of masculinity.

44. *Id.* at 279. The Court noted, however:

This is not to say that the inevitability or foreseeability of consequences of a neutral rule has

The language of *Feeney* implies that an unconstitutional discriminatory purpose must be a *purpose to harm* a protected group. Evidence demonstrating that police officers do not arrest in domestic violence cases because they believe it is acceptable for men to batter their wives would demonstrate a purpose to harm women, and would be evidence that the non-arrest policy was selected "at least in part 'because of' . . . its adverse effects" on women. It is not clear from *Feeney*, however, that such a purpose to harm requires an invidious or malicious intent to allow women to be battered. Discriminatory intent should also be found if it can be shown that the police's seemingly benign support for the privacy of the family is actually premised on the belief that men should be in charge of the home. Acting upon such a stereotypic view of sex roles directly harms women, and thus should be interpreted to indicate discriminatory intent.⁴⁵

B. *Proving Discriminatory Intent*

There is anecdotal evidence that the views of many police officers today are much like the old common law notions explicitly condoning men's right to batter. Some officers still believe that men are the head of the household, and should therefore have the prerogative to beat their wives.⁴⁶ Such evidence, when available, supports a finding that a police policy of non-intervention in domestic violence is motivated by discriminatory intent.

Arlington Heights suggests that an inference of discriminatory intent may also be drawn from the disproportionate harmful effect of a policy.

no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn. But . . . an inference is a working tool, not a synonym for proof.

Id. at 279 n.25.

45. See *infra* notes 54-72 and accompanying text.

46. Thus, as Detroit's Executive Deputy Chief of Police James Bannon says, Police response to social conflict, particularly domestic social conflict, is intertwined . . . quite possibly with traditional conceptions of male-female roles. There appears wider acceptance of the idea that a little corporal punishment to the recalcitrant wife is not all that deviant. . . . [Police] are socialized to regard females in general as subordinate.

J. FLEMING, *supra* note 3, at 171-72, 152. "There is anecdotal evidence to suggest that some police officers subscribe to male subcultural norms that justify wife beating . . ." Bowker, *supra* note 3, at 490. Examples of such anecdotes include "officers who openly blamed the wives for their own victimization, making comments to the effect that women who can't keep the house well deserve to be beaten." *Id.* From an interview with a police officer:

I had a call and this guy was beating his wife up. My partner took me outside and said, "Look, son. I'm going to tell you something. I've been married probably longer than how old you are." He said, "My wife feels as though I don't love her anymore, so at least once a month, I start an argument, I slap her around a little bit, and we have a perfect marriage. I've been married 35 years."

J. FLEMING, *supra* note 3, at 151. Such anecdotes are equivalent to the "contemporary statements by members of the decisionmaking body" that provide evidence of the decisionmaker's discriminatory intent. *Arlington Heights*, 429 U.S. at 268.

Although *Feeney* expressly states that the knowledge that a policy will disproportionately harm a protected group is not by itself sufficient to prove discriminatory intent, the Court in *Feeney* did state that proof of such knowledge creates an inference that the resulting harm was intended.⁴⁷ Thus discriminatory intent may be proved in part by a showing that a police non-arrest policy disproportionately harms women, and that the police had foreknowledge of this disproportionate harm.

1. *Foreseeable Disproportionate Harm*

The public generally perceives spousal abuse to be abuse by men against women. For example, in both conversation and literature, the term “domestic violence” is often used synonymously with “wife battering.”⁴⁸ The accuracy of this common perception is revealed by studies showing that 75% to 95% of the “domestic disturbance” complaints filed with police are made by women.⁴⁹ Clearly, if it is mostly women who seek police protection from domestic violence, then a policy of not arresting batterers will predominantly leave *women* unprotected and open to further assaults. Because arrest following a domestic complaint has been shown to be the most effective means of preventing further physical harm,⁵⁰ there is little doubt that a policy against arrest in domestic violence situations disproportionately harms women.

Police are aware that their non-arrest policy disproportionately harms women, because the domestic violence victims that they see on their jobs are mostly women.⁵¹ Police manuals and testimonial admissions further demonstrate police officers’ awareness that women are the major victims of domestic violence.⁵² Even if police do not know that arrest is the best means of preventing further violence,⁵³ they do know that failure to arrest will leave a battered woman in an unprotected position, with the batterer still present and facing no restraints to stop him from beating her again.

47. See *supra* note 44.

48. See, e.g., *Domestic Violence: Study Favors Arrest*, *supra* note 16.

49. D. MARTIN, *supra* note 3, at 14. Citing stats. showing that the percentages of complaints filed by women are 82% in New York, 75% in Washington, D.C., 85.4% in Detroit, and 95% in Montgomery County, Maryland. See also *Bruno v. Codd*, 47 N.Y.2d 582, 582 n.2, 393 N.E.2d 976, 977 n.2, 419 N.Y.S.2d 901, 902 n.2 (1979) (citing 1978 study by Henry Street Settlement Urban Life Center, showing 29 out of 30 domestic violence complaints in New York City made by women).

50. See *supra* note 16 and accompanying text.

51. See *supra* note 49.

52. Police manuals discussing the proper response to domestic violence calls have explicitly referred to the victims as women. See, e.g., D. MARTIN, *supra* note 3, at 93–94 (discussing Oakland, Ca., Police Dept. TRAINING BULLETIN ON TECHNIQUES OF DISPUTE INTERVENTION). In *Scott v. Hart*, No. 76-2395 (N.D. Cal. 1976), the case brought against the Oakland, California police for their failure to arrest wife batterers, the Police Chief readily admitted that women are disproportionately the greatest number of victims of domestic violence. See *Gee*, *supra* note 5, at 559.

53. See *supra* note 16 and accompanying text.

2. *The Assertion of "Family Privacy" in Battering Situations*

Discriminatory intent can also be shown by examining more closely the police justification of "family privacy." Underlying the supposedly gender-neutral notions of family privacy is support for men's domination and right to rule in the home. Concurrently, the family privacy doctrine devalues women by failing to endow them with the same rights to police protection provided to other citizens.

Classical liberalism asserts that the privacy of the family is crucial for assuring the freedom of individuals. According to classical liberalism, the privacy of the family is necessary to ensure that individuals have some realm in which they can express themselves freely without fearing governmental regulation or insistence on conformity.⁵⁴ Although this liberal notion of family privacy is worthy of respect, and indeed has been used to expand the liberty and choices of women,⁵⁵ such a rationale becomes sus-

54. "[A] balance that ensures strong citadels of individual and group privacy . . . is a prerequisite for liberal democratic societies. The democratic society relies on . . . privacy as a shield for group and individual life." A. WESTIN, *PRIVACY AND FREEDOM* 24 (1967). See also H. ARENDT, *THE HUMAN CONDITION* 39 (1958) (family privacy counteracts "leveling demands" toward conformity); M. GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE U.S. AND WESTERN EUROPE* 122 (1977) (domestic privacy maintains pluralism and diversity); C. LASCH, *HAVEN IN A HEARTLESS WORLD* 6 (1977) (private home is humane refuge from competitive society).

55. Privacy doctrine has provided women with some of their most important protections, including the right to decide whether and when to bear a child. See *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion based on right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives based on right to privacy). However, many feminists would have preferred that those reproductive freedom decisions had been based on equality doctrines, rather than privacy grounds. See Editor's Note, *Privacy or Sex Discrimination Doctrine: Must There be a Choice?* 4 HARV. WOMEN'S L. J. i, xiii (1981) ("The [Supreme] Court's analysis reinforces the concept of a private sphere immune from state interference, even if discrimination against women is occurring within that sphere, and it puts limits on how a woman's right to choose pregnancy, abortion, or contraception can be protected—such protection stops at the door to the public sphere."); see also MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION* 48, 52-53 (J. Garfield & P. Hennessey eds. 1984) (criticizing *Roe's* basis in privacy instead of equality, and claiming that this choice resulted in *Harris v. McRae* which holds that public funding for abortions is not constitutionally required).

Although the doctrine of family privacy has helped women, feminist scholars have also recognized the ways in which the public/private distinction has oppressed women. Traditionally, a basic tenet of the public/private distinction has been the relegation of women to the domestic sphere, an action that has been concomitant with their exclusion from the public sphere. The assertion that women are suited only for the home has often been used as the justification for denying women access to jobs, education, voting and all other rights involving positions of power outside of the home. See N. COTT, *THE BONDS OF WOMANHOOD* 197-206 (1977); see also S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 274-75 (1979) ("[T]he existence of a distinct sphere of private, family life . . . leads to . . . the perception of women as primarily suited to fulfill special 'female' functions within the home, and consequently to the justification of the monopoly by men of the whole outside world."); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-1501 (1983) (discussing effect of male/female, market/home dichotomy on women); Powers, *Sex Segregation and the Ambivalent Direction of Sex Discrimination Law*, 1979 WIS. L. REV. 55; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* 117 (D. Kairys ed. 1982) ("The law has furthered male dominance by explicitly excluding women from the public sphere and by refusing to regulate the domestic sphere to which they are thus confined."). A broad argument against family privacy is not necessary here, however; whether "family privacy" is seen as harming women, or is valued for the classical liberal protections it purportedly

pect when it is used to justify state inaction in the face of a battering situation.⁵⁶ The willingness of police to ignore both battering men's criminal behavior and battered women's pleas for help demonstrates police intent to allow women to be harmed by men. Such respect for male rule is a stereotype which harms women, and provides evidence of the police's discriminatory intent.⁵⁷

When police refuse to arrest a man who has committed an assault because the victim is his wife, the state re-defines a criminal assault as "domestic violence," thereby changing an otherwise criminal act into non-criminal behavior. The state creates a special category of violence that is immune from the norms of criminal law. The non-arrest policy is not simply an omission or failure to act, but is an act itself—a reinterpretation and social construction of behavior that transforms a crime into a non-criminal "family problem."

For an officer to believe that wife abuse is not a crime, or at least not a crime for which penalties should be enforced, the officer need not believe that it is desirable for men to beat their wives. The officer may simply feel that men should be allowed to run their families as they see fit; that the state has no place in telling men what to do within their own homes.⁵⁸

Police do not afford all household members equal respect, however. In deferring to the male batterer's desire to rule the home as he wishes, the police ignore the express wishes of the battered women who ask the police for protection.⁵⁹ Thus the liberal promise of freedom gained through the private family realm applies only to men, not women. The man is free from state interference in how he runs his home. But the woman who is in physical danger within the home cannot even obtain recognition as an

provides, it is inappropriately invoked in battering situations.

56. When an inference of discriminatory intent is raised, the government must offer proof of a credible alternative—an innocent motive. If the only explanation offered by the government is not credible or is "irrational," then the initial inference of discriminatory intent may be considered proof. See Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1109 (1978) (evidence of disproportionate impact on protected group, "combined with evidence that circumstantially disproves any innocent goals that the government claims the challenged action pursues, is sufficient to warrant a finding that the action would not have been taken but for prejudiced motivation"). See also *City of Mobile v. Bolden*, 446 U.S. 55, 90 (1980) (Stevens, J., concurring) (standard of proof of discriminatory intent includes proof that policy "was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by [a discriminatory intent]").

In the case of police response to battered women, the purportedly innocent justification of "family privacy" is neither innocent, (gender-neutral), nor rational. See *infra* text accompanying notes 58–61.

57. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 278–80 (1979).

58. Cf. K. DeCROW, *SEXIST JUSTICE* 166 (1974) ("That the court will not enter into the marital abode to set rules is more than a respect for the privacy of citizens. It is also a tacit acknowledgement among male judges, male legislators, and male attorneys (most of whom are husbands) that a husband should not be told how to treat his wife.").

59. For a discussion of how the police should respond if the battered woman does not want her husband arrested, see *infra* notes 78–80 and accompanying text.

individual with the rights and protections to which any other member of society is entitled.⁶⁰ At the same time, then, that family privacy constitutes respect for the man's authority within the home, it disempowers women by refusing to recognize their most basic rights.⁶¹ Given the force of law in battering situations, a reliance on this doctrine of family privacy must be understood as an intent to perpetuate male rule within the home. Such a system harms women, and its purposeful perpetuation demonstrates discriminatory intent under the requirements of *Feeney*.

3. *Intent to Perpetuate Stereotypes: Proof of Discriminatory Intent*

As Professor Larry Simon writes,

A finding that the government would not have taken a challenged

60. Instead, her needs as an individual become secondary to the needs of the family unit, as defined by the man. The perception of women as wives or mothers—existing not as individuals, but solely within their role within the family, and in relation to men—has long been a part of women's oppression. "[T]he sphere of public life is in many important respects premised on the existence of the private sphere of a family whose demands define woman's function and life style, and exclude her from equal participation and status in the world of economic and public life." S. OKIN, *supra* note 55, at 281.

That women are defined as mothers is a political fact and reflects a political need of patriarchy, which is based partially in the biological truth that women bear children. The transformation of women from a biological being (childbearer) to a political being (childrearer) is part of the conflict expressed in the politics of patriarchy. Patriarchy seeks to maintain the myth that patriarchal motherhood is a biological reality rather than a politically constructed necessity. . . . [T]he state's embodiment of the public and private division . . . aids in this process. The state legitimates the notion that women function outside the public realm as noncitizens and nonrational beings.

Z. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 15–16 (1981). By refusing to intervene in the family unit to protect the rights of the individual women within that family unit, the state actively contributes to the sexist definition of women as non-distinct from their families, and thus denies women their rights as individuals.

61. According to Catherine MacKinnon, defining the family as private allows those with greater power in that realm to dominate, undisturbed:

When the law of privacy restricts intrusions into intimacy, it bars change in control over that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect. . . . [A]bstract privacy protects abstract autonomy, without inquiring into whose freedom of action is being sanctioned, at whose expense. . . . From this perspective, the legal concept of privacy has . . . protected . . . male supremacy.

MacKinnon, *supra* note 55, at 53.

Frances Olsen concurs that inherent in the notion of privacy is an acceptance of the status quo of power relations:

The state is said to take a neutral stance toward the family . . . when it ratifies the preexisting social roles within the family. . . .

[T]hus, it would be considered intervention for the state to treat the members of a family as juridical equals. . . .

"[I]nterference" is not a simple description of state action or inaction, but rather a way of condemning particular state policies, usually those aimed at changing the status quo.

Olsen, *supra* note 55, at 1504–06. Whether or not this feminist insight is accepted generally, it is clear that in battering situations, the dominance of the batterer is strengthened by the state's decision not to intervene.

action but for . . . prejudiced attitudes is not necessarily equivalent to a finding that the action was taken in pursuit of . . . prejudiced goals. It is possible and in some cases probable that the decision process through which an individual or a group determines to take an action can be so affected by prejudiced attitudes that the action would not have been taken but for these attitudes.⁶²

According to Simon, individuals sometimes fail to recognize the true attitudes that prompt their actions, particularly when they are motivated by prejudice. "Stereotypes" enable people to practice "self-deception," and not to perceive the prejudicial motives for their actions.⁶³ If a court, relying on circumstantial evidence, finds that prejudicial attitudes toward a group influenced the state's policy choices, it should find an equal protection violation. Thus, Simon argues, proof of stereotypic and prejudicial motivations, rather than proof of an explicit goal of disadvantaging a protected group, is adequate to find an equal protection violation.⁶⁴

The Supreme Court has recognized the harmfulness of stereotypes and the impermissibility of basing governmental decisions on stereotypic notions.⁶⁵ In *Mississippi University for Women v. Hogan*,⁶⁶ the Court disallowed Mississippi's policy of limiting enrollment in a nursing school to women, despite the fact that women purportedly benefited from the greater number of class positions available to them. Although *Hogan* deals with an explicitly gender-based classification, the court addressed the issue of discriminatory intent, and looked for the "actual purpose underlying the discriminatory classification," rather than the "benign, compensatory

62. Simon, *supra* note 56, at 1060.

63. *Id.* at 1061.

64. *Id.* at 1061-62. Another author suggests that, to prove discriminatory intent in post-*Feeney* sex discrimination cases, it should

be sufficient to show that the framing of a disputed policy was premised on archaic and outmoded notions about women. . . . Even proof of *indifference* to the fate of women might be considered relevant if it reflects stereotypic thinking about "women's place". Although it seems reasonable under this analysis to require that plaintiffs demonstrate that a law would not have been enacted *but for* this kind of stereotypic thinking, it goes too far to suggest that plaintiffs must show that the law would not have been enacted but for legislative desire to achieve harmful effects.

Note, Rosenblum, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376, 1398 (1979) (emphasis in original). See also Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978). Clark explains that sex discrimination may discount the "moral worth" of individuals not by hostility, but through paternalism. "Invidious motivation thus does not necessarily portend a malicious or even a conscious discounting of the individual. [Laws may be unconstitutional and discriminatory even though legislators] sincerely believed that they were doing the best thing possible for women." *Id.* at 965.

Similarly, Brest has explained that "racial value judgments appear in forms besides 'racial antagonism'— for example in paternalistic assumptions of racial inferiority." Brest, *supra* note 37, at 7.

65. See *supra* notes 27-28 and accompanying text.

66. 458 U.S. 718 (1982).

purpose" put forth by the state.⁶⁷ The harm to women in *Hogan* was the stereotype itself—the view that nursing is a profession meant only for women. As the Court said,

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.⁶⁸

Thus, the Court held, a law based on such views violates the equal protection clause.

Thus, evidence that a policy decision is motivated by stereotypic thinking is also proof of a discriminatory intent, and is therefore constitutionally impermissible even if there is no explicit desire to cause harm or to disadvantage a group. Stereotypes may also, in and of themselves, contain a real, recognizable harm. In *Hogan*, the stereotype of nurses as women perpetuated a stigma of inferiority.⁶⁹ Similarly, the harm of segregated schools recognized in *Brown v. Board of Education* was, in large part, the stigma of inferiority that was associated with segregation, rather than the actual barriers preventing black children from attending schools with whites.⁷⁰ Such stigmatizing, dignitary harms are proscribed by the Constitution; state action motivated by the desire to perpetuate such stigmatizing stereotypes is proof of discriminatory intent.⁷¹

Once we recognize that perpetuation of a stereotype is itself a harm, both because of the unconscious prejudicial motives that underlie it, and

67. *Id.* at 730. Thus the holding of impermissibility of stereotypes as a basis for governmental actions should be equally applicable in cases of facially neutral classifications.

68. *Id.* at 729–30. The Court also cited statistics showing that "excluding men from the field has depressed nurses' wages. . . . To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit." *Id.* at 729 n.15 (citations omitted).

69. See Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 38 n.147 (1983) (characterizing *Hogan* as stigma case).

70. 347 U.S. 483, 494–95 (1954) ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group.") (citing *Brown v. Board of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)). According to Charles Black, "[T]he social meaning of segregation is the putting of the Negro in a position of walled-off inferiority. . . . [S]uch treatment is hurtful to human beings." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960). See also Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 28 (1959) ("We see little room for doubt that it is the function of Jim Crow laws to make identification as a Negro a matter of stigma. Such governmental denigration is a form of injury the Constitution recognizes and will protect against.").

71. See Simon, *supra* note 56, at 1052.

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because of the stigmatizing harms that accompany it, we can see that a police non-arrest policy meets the *Feeney* standard of intent. Police select a non-arrest policy "at least in part *because of*"⁷² their beliefs that men should be allowed to rule their homes undisturbed, even when this tradition of male domination finds its expression in actual, physical harm to women. Thus, even without proving that police act with the explicit goal of harming women, discriminatory intent can be shown through evidence that police would not have followed a non-arrest policy but for their stereotypical views of the proper roles for men and women.

IV. REMEDIES

A police policy of not arresting batterers, whether it is sex-based or gender-neutral, denies women the equal protection of the law. Battered women can seek civil damages for such a deprivation of their constitutional rights⁷³ under 42 U.S.C. § 1983,⁷⁴ even when such deprivation is a

72. See *supra* note 44 and accompanying text.

73. Battered women who are harmed by battering men as a result of the police's non-arrest policy can also seek damages by bringing tort actions against police. The best known case is *Bruno v. Codd* 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (upholding justiciability of suit against police, department of probation, and family court for failure to enforce laws against battering men, but denying declaratory and injunctive relief because consent judgment already entered). See also *Nearing v. Weaver*, 295 Or. 702, 670 P.2d. 137 (1983) (police officers who knowingly fail to enforce restraining order against father may be liable for psychic and physical harm to mother and children; police not immune although they perform discretionary function); *Barnes v. Nassau County*, No. 12433 (N.Y. Sup. Ct. 1982) (suit against police and county for failing to arrest battering husband when arrest warrant and temporary protective order issued); *Tedesco v. Alaska*, No. 4FA-81-593 (Alaska 1981) (money settlement in suit by deceased battered woman's estate for negligent failure to investigate and prosecute man who battered and killed woman); *Doe v. City of Belleville*, No. 81-5256 (Ill. 1981) (consent decree entered concerning police response and arrest procedures); *Kubitschek v. Winnett*, No. 8587 (Or. Cir. Ct. 1980) (settled in 1981, for undisclosed amount); *Sorichetti v. City of New York*, 95 Misc.2d 451, 408 N.Y.S.2d 219 (1978), *aff'd* 70 A.D.2d. 573, 417 N.Y.S. 2d 202 (1979) (police may be found liable for failing to act when battering husband violated restraining order); *Baker v. New York*, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966) (municipality may be found liable for not protecting woman who had restraining order against battering husband); *Jones v. Herkimer*, 51 Misc.2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966) (municipality owed special duty of care to protect woman from assailant who had been put on probation); (unreported cases available from National Clearinghouse for Legal Services).

For an example of an effort to change police policies without litigation, see Pence, *The Duluth Domestic Abuse Intervention Project*, 6 *HAMLIN L. REV.* 247 (1983) (describing successes of privately funded Minnesota project that coordinates services of police, prosecutors, courts and human service agencies).

74. That statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

result of police's omissions, rather than commissions.⁷⁵

Although police refusal to arrest batterers when battered women ask for help violates the Fourteenth Amendment, a constitutional police policy need not remove all police discretion. Rather, police should apply the same active discretion that they use in other assault cases.⁷⁶ As stated in

42 U.S.C. § 1983 (1982). Legislative history shows that § 1983 was enacted in 1871 as a response to the violence of the Ku Klux Klan against black people in the South and to the complete failure of the states to afford black people protection or to prosecute their persecutors. Act of Apr. 20, 1871, c. 22, §1, 17 Stat. 13. The law "provide[d] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (discussing legislative history of 42 U.S.C. § 1983).

The situation of battered women today is similar to that of the blacks in the Reconstruction South. Just as racial prejudice stopped police from enforcing laws and arresting offenders, so contemporary sexist attitudes underlie the police's failure to respond to battered women's pleas for help.

75. For examples of police liability under §1983 for failures to act, see *Cooper v. Molko*, 512 F. Supp. 563 (N.D. Cal. 1981) (police failure to interfere with abduction by parents of member of religious group because of their opinion of religious group); *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979) (withdrawal of police and fire protection from Indian Reservation because of racial animus); *Smith v. Ross*, 482 F.2d 33 (6th Cir. 1973) (sheriff told landlord to evict interracial band because blacks were not welcome, and told band that he could not protect them from townspeople's violence); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) (police intentionally failed to protect plaintiffs from harassment because harassers were on police force); *Huey v. Barloga*, 277 F. Supp. 864 (N.D. Ill. 1967) (police failed to protect individual who they knew might be attacked in racial disorder); *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943) (sheriff failed to provide police protection to Jehovah's Witnesses, and subjected them to indignities).

A suit for money damages forces police departments to consider their policies in economic terms, and may increase the political and official pressure from department administrators to change police policies. Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 LAW & INEQUALITY: J. THEORY & PRAC. 557, 575 (1984). Still, "the attitudes which originally [gave] rise to the practice of arrest-avoidance in wife-assault cases are independently and deeply ingrained in the members of the police force. They are not likely to be eliminated by a mere change in regulations." Thus, it requires protracted efforts by plaintiffs' counsel and battered women's advocates to insure compliance with the terms of any settlements. Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. RPTR. 7, 31 (1978). See also Pastoor, *supra*, at 575 (battered women and their advocates must "assert massive efforts to supervise the police to insure that police practices actually change"); Note, Fromson, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 167 (1977) (attitudes of police may persist, but class action lawsuits can be potent tools for change).

76. Police have sometimes complained that the fear of prosecution for wrongful arrest prevents them from arresting batterers if they have not actually witnessed an assault. In response to this police concern, battered women and their advocates have pursued legislation to explicitly denote the police's obligations in battering situations. Currently twenty-five states have enacted laws that allow police to make warrantless arrests for misdemeanor offenses in domestic abuse cases and/or for violations of protection orders. See, e.g., MINN. STAT. ANN. § 629.341 (West 1983) (mandating probable cause arrest in cases of domestic violence.); see also L. LERMAN, *supra* note 3, at 125 n.15 (listing states that have passed such warrantless arrest laws). Such laws broaden the police's ability to arrest in battering situations, since in many states police can make a warrantless arrest for a felony when there is probable cause, but can only arrest for misdemeanors if they actually witnessed the crime. See generally *id.* at 124-31 (discussing and comparing different arrest laws); D. MARTIN, *supra* note 3, at 90-92 (discussing restrictions on police's ability to arrest).

A broad expansion of probable cause arrest powers has been criticized by many people, however, because of the potentially racist and classist ways that such power can be used by the police. See Pastoor, *supra* note 75, at 596 n.191 (citing critics). Some probable cause arrest laws, such as the Minnesota statute discussed above, are restricted to cases of spouse abuse, thereby helping battered women without giving police broader arrest powers generally. See also FLA. STAT. ANN. § 901.15(6) (West 1982) (allowing warrantless probable cause arrest in cases of spousal abuse).

Bruno v. Codd,⁷⁷ “[p]laintiffs do not seek to abolish the traditional discretionary powers of the police; they merely seek to compel the police to exercise their discretion in each ‘particular situation’, and not to automatically decline to make an arrest solely because the assaulter and his victim are married to each other.”

The most difficult question police and battered women’s advocates face is the question of how police should respond if a battered woman does not ask the police to arrest her husband, or if she asks the police *not* to arrest her husband.⁷⁸ One reason a battered woman will not want her husband arrested is fear—fear that her husband will follow through on his threats and beat her again, even more viciously, because she had him arrested. There may be other reasons that a woman would not want her batterer arrested too. She may not want her children to see their father being taken away in handcuffs; she may be concerned that he will lose his job if he goes to jail, depriving the family of its main source of income. The police officer who arrives on the scene may be unable to tell if the woman’s silence, or her request that the batterer not be arrested, stems from her fear of her batterer’s retaliation, or from other emotional or practical considerations.

On a policy level, some battered women’s advocates argue that the burden should be on the state, and not the victim, to decide to arrest anyone acting in violation of criminal laws.⁷⁹ Others, however, believe that the battered woman has the best knowledge of how to deal with her own danger and how the batterer is likely to respond to arrest, and thus that she should have control over the arrest decision.⁸⁰

Whether police are constitutionally required to arrest batterers regardless of what the battered woman requests depends on how police treat other assault cases. If it is found in general that police arrest policy is

77. 90 Misc.2d 1047, 1049, 396 N.Y.S.2d 974, 977 (Sup. Ct. 1977) *rev’d in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff’d* 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

78. There are no statistics, to my knowledge, that disclose how frequently either of these situations occur. It seems more likely that a battered woman would ask the police not to arrest her batterer when someone other than the woman herself has called the police (e.g., a neighbor), but it is also possible when the victim herself has contacted the police.

79. This relieves the battered woman from feeling that *she* sent her husband to jail, and properly bases the arrest decision on the batterer’s criminal behavior. A firm arrest policy whenever there is probable cause, regardless of the battered woman’s expressed feelings, might decrease the likelihood of further battering once the battering man is released.

80. In Seattle, battered women have input in choosing which of a variety of options will be most helpful in dealing with their batterer, and will best achieve their safety. When a battered woman contacts the police, she receives a letter from the city attorney’s office inviting her to discuss with an advocate the type of sentence she feels the defendant would benefit from, e.g., alcohol or batterer’s counseling, a no-contact order, payment of bills she has incurred as a result of the incident, or jail time. See *Reducing Case Attrition: Working With Battered Women*, 4 RESPONSE TO VIOLENCE IN THE FAMILY No. 3, 5, 5–9 (1981).

guided by probable cause considerations, rather than by victims' requests, then police are constitutionally required to arrest batterers when there is probable cause to believe they have committed a crime, regardless of what the woman says.

In addition to arresting and prosecuting the batterer, police and prosecutors should take precautions to protect the battered woman from retaliation. It is well within a prosecutor's power to ask that a high bail be set for someone who is likely to pose a danger to the community, or perhaps even ask that the state pay for the relocation of the woman who fears retaliation,⁸¹ in order to assure her safety.⁸²

A strong police policy of viewing woman battering as a crime will begin to erode the stereotypes that tell batterers that their behavior is acceptable. Without state approbation for their actions, and with serious criminal consequences for their battering, many batterers will be likely to change their behavior.⁸³ A police policy⁸⁴ that affirms battered women's right to

81. See, e.g., *People v. Carradine*, 52 Ill.2d 232, 231, 287 N.E.2d 670, 670 (1972).

82. Several prosecutors' offices have devised special programs for handling domestic violence cases, many of which have decreased the rate at which women drop charges, have increased the conviction rate for batterers, and have given victims a greater voice in choosing remedies for the batterer's criminal behavior (e.g. mandatory counseling, incarceration). For an excellent, in-depth discussion and evaluation of these programs, see L. LERMAN, *supra* note 3. A troubling issue for prosecutors, like police, is how to proceed when a battered woman is reluctant to press charges. For discussion of this issue, see *id.* at 42-43; Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIMINOLOGY 56 nn.115-26 and accompanying text.

Because prosecutors exhibit many of the same attitudes as police, battered women's advocates have also sued prosecutors in an attempt to force them to prosecute batterers as vigorously as stranger assailants. See, e.g., *Doe v. City of Belleville*, No. C-81-5256 (S.D. Ill. 1981) (consent decree entered); *Raguz v. Chandler*, No. C-74-1064 (N.D. Ohio 1974) (class action suit for declaratory and injunctive relief against prosecutors for refusal to prosecute battering husbands and boyfriends; resulted in consent decree requiring prosecutors to consider each case on its merits, advise police that batterers will be prosecuted, and allow women to request review of decisions not to prosecute); J. BLUM, MEMORANDUM ON PROSECUTORIAL DISCRETION (1981) (cases and memorandum available from National Center on Women and Family Law, N.Y.C.); Woods, *supra* note 75, at 13-14.

83. Group counseling programs for battering men also exist in many cities to help men recognize their violence, explore its causes, and learn non-violent alternatives (e.g., Emerge, Boston, Mass.; Brother-to-Brother, Providence, R.I.; Men Against Domestic Violence, New Haven, Conn.).

84. Maria Pastoor believes that getting police to arrest batterers empowers women:

Arrest can kindle the battered woman's perception that society values her and penalizes violence against her. This perception counteracts her experience of abuse. . . . When a battered woman calls the police and they arrest the man who beats her, her action, along with the officers' actions, do something to stop her beating.

Pastoor, *supra* note 75, at 595. In contrast, Catherine MacKinnon, in a radical feminist critique, has suggested that pursuing liberal goals of making the state protect battered women by arresting batterers "entrust[s] women to the state" and does little to empower women themselves. Trying to change the police's response, she says, also does little to "address . . . the conditions that produce men who systematically express themselves violently toward women, women whose resistance is disabled, and the role of the state in this dynamic." MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 643 (1983). Zillah Eisenstein similarly understands that the liberal feminist goal of litigating to demand equal rights for women is inherently limited to achievements within the basic patriarchal structures, because it is premised on an individualistic view of women. To be truly radical, feminists must address problems of women as a class. Z. EISENSTEIN, *supra* note 60, at 177-97. Janet Rifkin notes that litigation to help women is inherently limited in

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the equal protection of the laws will not by itself end the problem of woman battering, but it will ensure that battered women receive the protection by the state that the Constitution says they deserve.

what it can accomplish, because it relies on the paradigm of law, which is male and patriarchal, and thus does not change the basic sexual hierarchy. Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L. J. 83, 95 (1980). Further, "patterns of domination are reinforced by the lawyer-client relationship, in which the client is a passive recipient of the lawyer's expertise." Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY: J. THEORY & PRAC. 21, 30 (1984).

This radical feminist critique is important as a reminder that legal strategies only go so far. Other strategies are necessary in order to build on women's collective strengths and to increase the consciousness that battering is a symptom of systemic male domination, not an individual flaw of the man or a fault of the woman. Battered women's shelters can be examples of such strategies. Despite its limitations, however, legal action to improve the response of the police to battered women is critically important. In practical terms, arrest may actually save women's lives by intervening before the violence escalates to the extreme of murder. Furthermore, well-publicized legal victories such as *Thurman* give a strong message to both police and batterers that their behavior is unacceptable, as well as costly; it also sends a message to women that their needs are heard, and their lives are valued. A vital part of change comes from making the problem public, so that women no longer need to hide at home, blaming themselves for the problems in their marriage. Litigation is one way of providing battered women with such a public voice.